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6a Moore, *Federal Procedure*, 3857 53

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant*,

v.

BLACK BALL FREIGHT SERVICE, *ET AL.*, *Appellees*.

No. 382

INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

BLACK BALL FREIGHT SERVICE, *ET AL.*, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEES CONSOLIDATED FREIGHTWAYS CORP., ET AL.[1]

Questions Presented

1. The first issue in this case is not, as phrased by appellants, whether the Interstate Commerce Commission may grant a motor carrier's application for temporary authority "when the carrier's application reasonably, but

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[1] This brief is submitted on behalf of four of the appellees: Consolidated Freightways Corporation of Delaware; Riss & Company, Inc.; Tri-State Motor Transit, Inc.; and Yellow Freight System, Inc.

not literally, complies with the information requirements of the Commission's temporary authority rules" (Gov't Br. pp. 2-3; see also AFL Br. p. 3). Had the lower court considered that there had been "reasonable" compliance with the regulations, it doubtless would, and should, have approved the Commission's action. The question, rather, is whether the carrier's application did in fact "reasonably comply" with the Commission's regulations, and whether if it did not the Commission's order granting the application should be set aside.

2. Assuming that the application, as supplemented by the material submitted upon the reopening of the proceeding by the Commission, did comply with the Commission's regulations, the second issue is whether the Commission's grant of the application should nonetheless be set aside on the ground that the Commission had not secured leave of the lower court to reopen the proceeding.

Statement of the Case

While the Solicitor General's statement of the case is, by and large, to the point, that of American Farm Lines ("AFL") emphasizes elements that are of marginal relevance at best and discusses them in such fashion as to require us to sketch the background of this controversy in somewhat more detail than we otherwise would.[2]

As AFL would have it, this dispute comes about because of legislation that "was introduced in Congress with the support of the American Trucking Associations, Inc."—the representative of the "entrenched carriers"— and because of litigation brought against AFL by "a group of common

[2] To avoid confusion in references on the one hand to the joint brief for the Interstate Commerce Commission and the United States, and on the other to the actions of the Commission, we refer herein to the brief, and the positions set forth in that brief, as the Solicitor General's. (The United States did not appeal, but on the merits supports the Commission.)

carriers . . . whose rates were generally higher than those" of AFL and who were "attempting to impose severe limitations" on AFL. But these efforts were, in this view of the case, thwarted before the Commission because the Department of Defense, despite an "attempt" of the American Trucking Associations "to bring pressure . . . by going directly to the Secretary," stood fast in its support of AFL. However, the "massive opposition" of the regulated carriers, triggered by AFL's "willingness to compete with existing carriers in terms of rates—a phenomenom that is rare within the motor carrier industry"—"induced the district court" to set aside the Commission's action "on the basis of highly-technical procedural arguments" (AFL Br. pp. 5, 6, 7, n. 8, 28, 49).

The facts are as follows:

1. *Background.* This litigation arises basically out of a struggle between a type of carrier exempt from Commission regulation—the cooperatives—and the regulated carriers for the business of shippers that are not members of the cooperatives. The exempt cooperative carriers, naturally enough, want to supplement their income by carrying the traffic of non-members, particularly where that business would enable them to avoid "deadheading" equipment to its origin after transporting shipments for their members. Since they are not regulated and consequently cannot be charged with discrimination, they are free to charge as little as they wish for such movements; and of course anything they receive will be better than nothing. Moreover, they are free to solicit and accept only the most profitable traffic, since they are not "common carriers." The regulated common carriers, on the other hand, regard these activities by the cooperatives as an unfair infringement on their business, since in general the regulated carriers are obliged by law not to vary their rates whether or not the conse-

quence is the "deadheading" of equipment and since they are obliged to carry all traffic, profitable or not.[3]

2. *The* Northwest *decision and its consequences.* Until about 1966, this clash between the exempt cooperatives and the regulated carriers was relatively muted. Evidently the commonly accepted view of the statutory exemption of cooperatives was that it did not permit much, if any, transportation of non-member freight.[4]

In 1965, however, this conception of the limitations of the exemption was radically altered by the decision of the Court of Appeals for the Ninth Circuit in *Northwest Agricultural Cooperative Ass'n* v. *Interstate Commerce Commission*, 350 F.2d 252, *cert. denied*, 382 U.S. 1011 (1966). That suit was brought by the Commission to restrict cooperatives to the transportation of freight for their members. The court, however, held that cooperatives could, without losing their exemption, transport the freight of nonmembers as long as that transportation was "incidental and necessary" to the cooperatives' primary purpose of serving their members, 350 F.2d, at 257.

This decision "stimulated the transportation of nonfarm related traffic by exempt agricultural cooperatives for nonmembers." Examiner's Report, *United Agricultural Transportation Association of America Marketing Co-op—Common Carrier Application* (MC-133250, Sub No. 2), p. 3. And at "about the same time, the Department of Defense . . . adopted a policy of using exempt cooperatives in order to obtain effective transportation at the lowest cost" (*ibid.*).

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[3] The Government is one of the few shippers in whose favor the regulated carriers may discriminate in rates. 49 U.S.C. 22.

[4] The exemption was provided by 49 U.S.C. 303(b)(5), which excluded from regulation "motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act . . . or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined, . . ."

The consequent surge of non-member, and in particular Government, carriage by the cooperatives is illustrated by the growth of AFL Government business. Thus, in fiscal 1966 AFL carried no such traffic at all; in 1967 it grossed $1,284,594.94 from that traffic; in 1968 it grossed $4,449,478.39; and in the first six months of 1969 it grossed almost as much as in all of 1968—$4,040,633.80. (A. 412a.)

To the regulated carriers, and particularly to those which derive a large part of their revenue from Government traffic, these inroads by carriers they considered unfairly advantaged posed a most serious threat. Their options were two: First, at a minimum to hold the exempt carriers to the "necessary and incidental" standards adopted by the Court of Appeals in *Northwest Agricultural Cooperative Ass'n;* and second, to urge upon the Congress remedial legislation. They pursued both courses; and—we note this because AFL does not (Br. pp. 5-6)—their efforts were supported by the Commission.

3. *Litigation against AFL.* Thus, with respect to AFL, a number of regulated carriers brought suit in the United States District Court for the Western District of Oklahoma alleging widespread transgressions of the law by AFL in its transportation of Government freight. The Commission intervened in support of the regulated carriers. The court held in favor of the plaintiffs and entered three permanent injunctions against AFL. Those injunctions—as AFL fails to mention (Br. p. 6)—were subsequently affirmed by the Court of Appeals for the Tenth Circuit. *Munitions Carriers Conference, Inc.* v. *American Farm Lines,* 415 F.2d 747 (1969).

These injunctions did not, however, halt AFL's illegal operations. Accordingly, the regulated carriers, joined by the Commission, moved the district court to hold AFL and its manager in contempt. That court, after a hearing, found

that AFL had "completely and deliberately ignor[ed]" one of the injunctions; that its actions were "demonstrative of the general devotion of defendants to their government traffic and their preferential handling of such over the traffic of their own members"; and that, in sum, AFL and its manager were "in contemptuous violation" of the court's order. The court, accordingly, levied a fine of over $74,000 against the defendants. Order of July 24, 1969, in *Munitions Carriers Conference, Inc.* v. *American Farm Lines* (Civ. No. 68-148).

4. *The 1968 legislation.* It was this sort of abuse of the "necessary and incidental" principle, together with the threat that the burgeoning non-member traffic of cooperatives posed to the economic stability of the regulated carriers, that led the Congress in 1968, with the endorsement of the Commission, to amend the cooperative exemption provision. The Senate Committee noted that the *Northwest Agricultural Cooperative Ass'n* decision "and the publicity attendant thereto has, as a practical matter, been construed by some cooperatives as an invitation to substantially expand their hauling of non-farm-related traffic for nonfarm members, and by certain groups and organizations as a device to institute unlawful transportation activities." Senate Report No. 1152, 90th Cong., 2d Sess., p. 6. It continued:

> "The relative decline of the Nation's common carrier system in recent years is a matter of serious concern. Several traffic studies reveal that common carriers have lost considerable traffic which they formerly handled and, at the same time, have been unable to share proportionately in the additional traffic generated by the Nation's expanding economy.
>
> "This decline is essentially a result of the growth of unregulated private and exempt carriage. But it is also attributable in part to the growth of unauthorized

and illegal carriage. Such illegal operators are inimical to the public interest, and if left unchecked, could ultimately undermine the common carrier system." *Id.*, at p. 2.

Under the 1968 legislation, the *Northwest* "necessary and incidental" restriction upon the transportation by cooperatives of non-members' traffic was explicitly incorporated into the statute, and in addition such transportation for non-members was limited to no more than 15 per cent of a cooperative's total interstate transportation in any year. 49 U.S.C. 303(b) as amended, P.L. 90-433, 82 Stat. 448. Regulations of the Interstate Commerce Commission implementing the amendment became effective July 7, 1969. 108 M.C.C. 799.[5]

5. *AFL's applications to the Commission.* With its illegal operations proscribed by federal court injunction, and sensing the imminence of the July 1968 legislation (AFL Br. p. 7), AFL in May of 1968 filed the application for temporary authority that is the subject of this litigation (A. 10a). The application was filed under Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. 310a(a), which authorizes the Commission to grant temporary operating authority "without hearings or other proceedings" where the authority relates to a "service for which there is an immediate and urgent need" and where there is "no carrier service capable of meeting such need." The application for temporary authority was followed two months later, in July of 1968, by an application for permanent authority, which is now pending before the Commission.

The rights sought by these applications were sweeping in terms of commodities, routes, and geography. Thus, AFL

[5] In our view the statute became effective on the date of enactment, not on the date of the regulation. That question, however, is not involved in this appeal.

requested both temporary and permanent authority for the movement for the Government of general commodities, including Class A and B explosives, over irregular routes and between all points in a nine-state middlewestern and southern region, on the one hand, and a five state western region, on the other.[6]

While the application for temporary authority related to the transportation of general commodities for all branches of the Government, the only statement that was filed in support of the application was that of the Department of Defense ("DOD"). That statement, dated May 15, 1968, characterized AFL's service as "extremely desirable" because the "services of this company have afforded the Department of Defense a meaningful measure, under practical conditions, of carrier capability in general" (A. 14a). DOD did not assert, however, that existing service was inadequate —or, in the words of the statute, that there was "no carrier service capable of meeting [its] need."

Within two weeks prior to the date of this supporting statement, DOD had dispatched two letters in which, in substance, it took the position that it could not say that an application by AFL would meet the statutory tests. The earlier of the two letters, dated April 30, 1968 and addressed to AFL, praised AFL's service, but said that while DOD

[6] AFL evidently believes that, if it secures such temporary or permanent authority, it will be able to operate as an exempt carrier and at the same time to carry Government freight without regard to the section 303(b)(5) limitation of non-member traffic to that which is "incidental and necessary" to the transportation of member traffic and in any event to no more than 15% of member traffic. We do not agree. As Section 303(b)(5) is worded, it is plain that Congress did not contemplate such a hybrid operation, partly exempt and partly regulated. Our view has recently been accepted in an examiner's report in *United Agricultural Transportation Association of America Marketing Co-op—Common Carrier Application* (MC-133250, Sub No. 2). Accordingly, if AFL's application for permanent authority is granted—or should this Court reverse the lower court's judgment respecting temporary authority—AFL will have to choose between regulated and exempt status as to all of its traffic.

"would like to retain this transportation source" it was "not in a position to state that there would be insufficient or inadequate service without American Farm Lines" (A. 11a-12a). The second letter, dated ten days later, and only five days before its letter supporting AFL's application, was a response by DOD to a letter from one of the appellees about the application. DOD stated that the Office of the Judge Advocate General of the Army had advised AFL of DOD's position, which was that, while AFL's service had been "satisfactory, fast, and economical" and while DOD "would like to retain this transportation source," DOD "is not in a position to state that there would be insufficient or inadequate service without American Farm Lines" (A. 13a).[7]

In sum, in support of AFL's application for authority to

[7] At about this point occurred what AFL darkly describes as American Trucking Association's attempt "to bring pressure on the Department to withdraw its support of AFL's application by going directly to the Secretary of Defense" (Br. p. 7 n. 8). That "pressure" consisted simply of a letter asking DOD to withdraw its support of AFL's application and to return to the position it had originally taken, as DOD's response discloses (A. 139a). Until reading AFL's brief, it had never occurred to us that anyone would consider such communication with a shipper as blameworthy. Nor, it seems, does AFL apply the same standards to itself as it does to its opponents, for the record establishes that AFL sent DOD at least one letter designed to enlist DOD's support (A. 11a). Indeed, unless AFL now represents it to be so, we are not disposed to assume that DOD's later repudiation of the position it had twice set to paper respecting the adequacy of existing service, and its still later introduction of additional evidence in support of AFL, was untouched by any intercourse between AFL and DOD.

Since, in its description of American Trucking Associations' correspondence with DOD, AFL quotes only part of DOD's response (Br. p. 7 n. 8), we set forth the singularly unenlightening passage in which DOD attempts to explain why its change of position was not a change of position:

> "With regard to the reference made in your letter to a communication from the Military Traffic Management and Terminal Service (MTMTS) in which it was stated that the DoD 'is not in a position to state that there would be insufficient or inadequate service without American Farm Lines,' we would point out that military logistics operations have to be carried on within the capabilities of resources and services available at any given time. Thus, our operations today are structured within the parameters of today's capabilities. To be

transport general commodities for the Government in a 14 state region, the record in its initial state contained a statement from only one department of the Government that did not assert the inadequacy of existing services, as well as two letters in which that department conceded that it was "not in a position" to make such an assertion, even though in all three documents the department expressed a desire to retain AFL's service.

Eighty protests to the application were filed on behalf of well over 100 motor and rail carriers. Each protestant asserted that it could provide some part of the service in question. Many of the protestants also challenged DOD's statements as not complying with the governing Commission regulations, said that they could not respond to the statement's generalities except with generalities, and asserted that DOD had never complained to them that their service had been inadequate (*e.g.*, A. 16a-138a).

6. *Commission proceedings prior to litigation.* The Commission's Temporary Authorities Board, on July 12, 1968, denied the application on the ground that the "applicant has not established that there exists an immediate and urgent need for any of the service proposed" (A. 141a-142a). However, AFL petitioned for reconsideration; and on September 3, 1968, Division 1, without explaining the basis for its disagreement with the Board, granted the temporary authority (143a-144a).[8]

Some of the protestants filed petitions for reconsideration

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satisfied, however, with today's capabilities and not to seek improvements in transportation services would, in our judgment be turning our back on progress, and not in keeping with our responsibilities to the Armed Forces and to the taxpayer.

"In summary, we do not consider that support of American Farm Lines' application for temporary authority is a reversal of DoD policy . . ." (A. 140a-41a).

[8] It has been held in like circumstances that the failure of the appellate division to set forth with reasonable specificity the grounds for its action invalidates the order. *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411 (D.Tex. 1956), *vacated as moot*, 352 U.S. 1028 (1957).

and motions to stay the order. The Commission, however, denied the motions to stay (A. 146a-148a), and the order became effective on September 16, 1968.

7. *Institution of the litigation.* Since the Commission had denied the motions to stay its order, a number of protestants, including all appellees in this Court, brought suit to set aside the order in the United States District Court for the Western District of Washington and moved for a temporary restraining order (*e.g.*, A. 149a). On October 2, 1968, Judge Boldt granted the motion (A. 166a) after a hearing during which he stated:

> ". . . [T]he . . . rules implementing the statute . . . specifically requires that there shall be supporting statements for these applications and that each one must at least specify what efforts have been made to procure the desired service . . . and to specify in particular names, addresses, when, where, and all the rest of it, all of it in great detail. I don't see anything like that in here" (A. 164a-165a).

8. *Reopening of the Commission proceeding.* After the district court had stayed the temporary authority order, the Commission reopened the proceeding for the taking of additional evidence. It did not do so by way of acting upon the pending petitions for reconsideration filed by some of the protestants. Rather, it did so because of a submission that had been filed by DOD. Thus, in a reply to the protestants' petitions for reconsideration—a reply filed two weeks after the district court's restraining order—DOD advanced additional factual claims in support of AFL's application (A. 170a, 391a). The day after that reply, AFL filed a petition that the proceeding be reopened (A. 391a). The Commission thereupon reopened the proceeding "on [its] own motion for the purpose of receiving a verified statement from the Department of Defense" that, the Commission directed,

should "specify the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by existing carriers. . . ." (A. 170a-171a). To assure the protestants an "opportunity to reply" to this new evidence, the Commission invited the submission of verified statements in rebuttal.

The Commission did not secure the permission of the District Court to reopen the proceeding. *After* it had entered its order reopening the proceeding, the Commission filed a motion in the district court seeking a stay pending the outcome of the reopened proceeding (A. 167a). Plaintiffs opposed on the ground that "the Commission was not authorized to reopen the proceeding because . . . [the] court had taken jurisdiction of the matter" (A. 391a). But this motion was never noticed by Commission counsel for hearing, and therefore it was never acted upon (A. 392a). A number of protestants also petitioned the Commission to vacate its order of reopening on the ground that "the Court having taken jurisdiction of this matter, the Commission was without power to re-open the proceeding" (A. 177a; 299a, 308a, 315a, 392a). Those petitions were never ruled upon specifically, but presumably were denied in the Commission's final order (A. 367a).

Upon the reopening, AFL submitted a supplemental DOD statement. Since the central legal issue in this case is whether that statement conformed to the Commission's regulations, we postpone to our argument a description of the statement.

The protesting carriers objected again that the DOD statement failed to comply with the regulations and that its claims of service inadequacies were so general that responses could be framed for the most part only in like generalities. However, within the limitations imposed by the vagueness of the DOD statement, protestants adduced a considerable body of additional evidence which may be

summarized as follows: First, between many of the points and as to many of the commodities in question, existing carriers did provide single-line, direct route, and/or two-man driver team service—that is, the type of service DOD said it wanted to continue receiving from AFL. Second, even where that was not the case, existing carriers provided a wholly adequate service. In that connection, protestants asserted that single-line, direct route service using team drivers is not necessarily superior to joint-line, regular route, single driver service, but that rather the quality of service depends upon the practices of the carriers involved. And, while disabled from rebutting with particularity the general DOD assertions respecting service deficiencies, protestants did assert that their records showed no failure to deliver DOD traffic on time and no complaints by DOD (A. 210a-363a).

Notwithstanding the district court's preliminary determination that the original DOD statement had not complied with the Commission's regulations, and despite the renewal of that claim by protestants respecting DOD's second statement, the Commission, on December 19, 1968, again granted the application of AFL without even mentioning the issue (A. 367a). The protestants for the second time went to court (A. 371a).

9. *Further judicial proceedings.* On January 6, 1969, Judge Boldt temporarily stayed the Commission's second order, noting that the Commission had reopened the proceeding "concerning matters then within the jurisdiction of . . . [the] court without applying for modification of the restraining order, notifying . . . [the] court or otherwise noting the fact that this court had and has jurisdiction of the review . . ." (A. 382a-383a). The three-judge court entered its final judgment on March 26, 1969, holding the orders void (A. 400a). The court's opinion set forth two alternative grounds: (1) the Commission failed to enforce the require-

ments of its regulations governing applications for temporary authority, specifically the requirements of subparagraphs 8 and 9 of 49 C.F.R. § 1131.2(c); and (2) the Commission had no authority without leave of the court to reopen its proceedings in order to take new evidence and to issue a new order based upon that evidence (A. 388a-399a).

The district court denied AFL's application for a stay of its judgment, but on August 21, 1969, Mr. Justice Douglas granted a stay (A. 422a).[9]

Summary of Argument

The lower court was correct in holding that the Commission's order awarding AFL temporary authority was invalid because the Commission had failed to enforce its own regulations and, alternatively, because the Commission had exceeded its authority in reopening the proceeding, taking additional evidence, and entering a new order without permission of the court.

1. The DOD statement did not substantially comply with the Commission's rules. Those rules require, *inter alia*, that the shipper supporting the application state "[w]hether efforts have been made to obtain the service" from existing carriers, and, if such efforts have been made, that the shipper provide "the dates and results of such efforts," the "[n]ames and addresses of existing carriers who have either failed or refused to provide the service," and the "reasons given for any such failure or refusal." 49 C.F.R. 1131.2(c)(8),(9). The Solicitor General (a) says

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[9] While it is a matter of little consequence, for the sake of accuracy we note that AFL is wrong in referring to what DOD said "in supporting AFL's stay application" insofar as AFL implies that DOD supported the application in this Court (Br. p. 14). In fact, while DOD supported the application in the lower court, it filed nothing in support of the application in this Court.

that DOD claimed it had made such efforts to obtain the service it desired and that those efforts were unsuccessful; (b) concedes that DOD did not provide data such as the dates of such efforts or the names and addresses of the allegedly defaulting carriers; but (c) says that these defaults were immaterial. But the defaults *were* material. The DOD statement, insofar as it related to the alleged failure of existing carriers to provide the desired service, consisted almost exclusively of a series of generalizations that were invariably so qualified that the force of the statements could not be gauged absent the sort of details required by the regulations. Had those details been provided, the "many, many instances," and the "in some cases," and the "sometimes," and the "some" might have turned out to refer to a relatively insignificant handful of defaults by existing carriers. Moreover, armed with the specific details required by the regulations, the protestants might have explained the alleged defaults to the satisfaction of the Commission. But without compliance by DOD with the regulations, the protestants' right to file rebuttal statements under the regulations (49 C.F.R. 1131.3(a)(1),(2)) was seriously undermined.

2. In such circumstances, the principle established by this Court in *Service* v. *Dulles,* 354 U.S. 363 (1957), and like cases is applicable. The Commission's rules are stated in mandatory terms; they are designed to provide a sound factual basis for adjudication by the Commission and accordingly to increase the chances of a fair determination by the Commission; they were concededly not complied with in several respects; the defaults were material in that compliance might have changed the outcome of the proceeding; and the economic consequences to the protestants were substantial, inasmuch as grants of temporary authority extend over long periods of time—surely two to three years in this particular proceeding. As in cases like *Service,* the

Commission was not obliged to adopt these regulations; but having adopted them it is bound by them.

3. AFL's approach to the case is not only incompatible with the Solicitor General's but is if anything even less meritorious. As we have noted, the Solicitor General agrees with appellees that DOD did indicate in its statement that it had made efforts to secure the service it wanted from other carriers and that hence, at least under a "literal" reading of the regulations, it was bound to provide the specified details as to these efforts. AFL, in contrast, attempts to avoid the problem entirely by asserting that DOD did not in fact make any such efforts and that accordingly it was not required by the regulations to provide details respecting efforts that it had not made. First, that is not what the DOD statement said. Second, the Commission in its order found that DOD "has attempted but has been unable to obtain the required and necessary type of service" (A. 368a). Counsel cannot substitute their views for that of the Commission. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962). Third, had DOD admitted in its statement that it had not tried to obtain the service it wanted from existing certificated carriers, AFL's application would have failed because of want of proof of the statutory requirement that existing carriers must be unable to provide the service. 49 U.S.C. 310a(a). In such circumstances, DOD's plea would have rested primarily, if not exclusively, upon its claim that it needed single-line service between all of the points involved; but the Commission's regulations provide that "[g]enerally the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority," and that such a grant will be made "only when it is clearly established" that the existing carriers cannot do the job. 49 C.F.R. 1131.4(b)(4).

4. The alternative ground for the lower court decision—

that the Commission's order should be set aside because the Commission reopened the proceeding without permission of the court—is also correct. It has long been established as the general rule that "[w]hile a case is in court the court's jurisdiction is said to be exclusive. The agency cannot act upon its order while the 'case' is 'in the court.'" Jaffe, *Judicial Control of Administrative Action* 709 (1965). This principle, which is closely related to the bar against action by a trial court while a case is on appeal, is "inherent in the nature of judicial review" (Gov't Br. p. 26) and accordingly applies to the Interstate Commerce Commission as well as to other agencies. *Inland Steel Co.* v. *United States*, 306 U.S. 153, 160 (1939); *Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, 231 F. Supp. 422 (D. Ill. 1964). Moreover, appellants' argument that an exception should be made in this case because some appellees had filed petitions for reconsideration that were pending when the court assumed jurisdiction is not well taken. First, those petitions were not authorized under the Commission's rules. Second, even if they had been the result should not be different, for otherwise one of the major purposes of the rule restricting agency authority would be frustrated. That purpose is to insure, by way of judicial control, that the agency in reopening the record is not simply acting as a litigant attempting to shore up its position in court, but rather is acting as an impartial adjudicatory agency. See *Atchison, Topeka and Santa Fe Railway Co.* v. *United States, supra.* That danger is no less present where petitions for reconsideration are pending when the court temporarily enjoins an agency order than where there are no such petitions. The facts of this case, indeed, are suggestive in this regard. The Commission did not reopen the record by way of granting the petitions for reconsideration. It acted on its own motion. It did not, moreover, meet the district court's concern by demanding compliance with its regulations. Rather,

it simply accepted additional evidence from DOD and then argued in court that because of this additional evidence its order should be sustained.

Argument

As to the first issue in this case—that relating to the Commission's regulations governing applications for temporary authority—the central questions are whether DOD's statement in support of AFL's application complied with those regulations and whether, if it did not, appellees were prejudiced in such fashion as to undermine the validity of the Commission's order. Accordingly, we will begin our argument with those issues and will then discuss a further question pressed by AFL—though not by the Solicitor General—namely, whether prejudicial non-compliance with the regulations can be disregarded on the ground that the regulations do not vest any rights in the parties opposing the application. In the final portion of our brief, we discuss the alternative basis for the district court's decision—the holding that the Commission's second order was invalid because it was the product of the Commission's action in reopening the proceeding after the institution of litigation and without authorization by the court.[10]

I

The Commission's Order was Properly set Aside By the Lower Court Because There Was Not Reasonable Compliance With the Commission's Regulations, Because Appellees Were Prejudiced Thereby, and Because the Regulations Were Binding upon the Commission.

Because of the terms in which appellants repeatedly characterize the contending positions with respect to the com-

[10] There is no dispute as to the lower court's judgment insofar as it set aside the Commission's first order. See Government Brief, page 3 note 4 and A. 385a.

pliance with regulations issue, we state at the outset what we conceive to be the governing principle and what we propose to establish in light of that principle. It is fair comment, of course, for appellants to urge that the lower court's decision, and our arguments, depend upon a "literal," or "rigid," or "hypertechnical," interpretation of the Commission's regulations rather than a "reasonable" interpretation. (See Gov't Br. pp. 13, 18; AFL Br. pp. 15, 19, 20, 21, 29.) Appellants are not accurate, however, when they also cast the question presented in terms of whether the rule should be one of "literal," as against "reasonable" or "substantial," compliance (Gov't Br. p. 3; AFL Br. p. 3). So far as we are concerned, the established requirement is simply that there be reasonable or substantial compliance with an agency's rules.[11] We intend to show that, measured by that requirement, the Commission's action is insupportable. Moreover, there is no basis for suggesting that the district court's view was that literal, as against reasonable, compliance was necessary. Such a view would have been at odds with a prior opinion of the same court, written by the same author, and involving the same regulations, which phrased the rule in terms of "enforcement of reasonable compliance." *Acme Cartage Co.* v. *United States,* 290 F. Supp. 453, 457 (1968). We begin, then, with the question whether there was in fact substantial compliance with the Commission's regulations.

A. *DOD's Statement Did Not Substantially Comply With The Commision's Regulations.*

1. *The purpose and content of the regulations.* There is nothing obscure about either the purpose or the meaning of

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[11] See, *e.g., Mendelson* v. *Macy,* 356 F.2d 796, 801 (D.C. Cir. 1966); *Sangamon Valley Television Corp.* v. *United States,* 269 F.2d 221, 224 (D.C. Cir. 1959).

the Commission's regulations here in question. Those regulations, which relate to the statements supplied by shippers in support of applications for temporary authority, are part of the rules promulgated in 1965 "to implement" the temporary authority statute. 49 C.F.R. 1131.1(a). The regulations divided applications for temporary authority into two types. In the first—referred to as applications for "emergency temporary authority"—there exists an "emergency" so "immediate and urgent" that there is not "sufficient time to afford . . . notice" to prospective protestants. 49 C.F.R. 1131.2(d), 1131.4(b)(3). In such circumstances, the regulations provide for truncated procedures that permit immediate action by the Commission.[12] But where such an emergency does not exist—as in the case at bar—the regulations provide for a limited adversarial proceeding based upon written evidence and argument. Thus, the regulations specify what the applicant must file, require that notice be published, and provide that "interested persons who can and will provide all or any part of the proposed service" be accorded the opportunity to file written protests. 49 C.F.R. 1131.3(a)(1),(2).

Apart from the rules respecting notice and an opportunity to be heard, the rest of the regulations are designed in the main either to establish substantive standards against which applications will be measured—such as that "[g]enerally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority," 49 C.F.R. 1131.4(b)(4)—or to insure the disclosure of information relevant to the statutory standards.

The regulations directly involved in the case at bar fall in the latter category. They provide that each application

[12] Examples of such emergencies provided in the regulations are a need "to prevent a plant shutdown, to move particular shipments in the interest of the national defense, to meet needs resulting from fires, floods, storms, or other disasters which affect the public health, safety, and welfare, disruption

"must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers"—the statutory tests—and that "[a]ny such supporting statement must contain at least" eleven items of particularized information bearing upon the immediacy and urgency of the need and the unavailability of service from existing carriers. 49 C.F.R. 1131.2(c).

Among the rules describing those eleven categories of information are the rules here at issue. Under subparagraphs 8 and 9, the supporting shipper "must" state:

> "(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> "(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."

The central question is whether DOD's statement of November 20, 1968 substantially complied with these subparagraphs.[18]

2. *The inconsistent approaches of AFL and the Solicitor General to the DOD statement.* Appellants join in saying that the DOD statement complied with subparagraphs (8) and (9); but they base their arguments upon quite different, and quite inconsistent, reasons. Indeed, the clash between the appellants in this respect suggests the grave difficulties

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in existing carrier services by work stoppages, unexpected cessation of existing transportation service, lack of equipment capable of transporting the involved commodity, failure or lack of storage facilities and imminent spoilage of perishable commodities. . . ." 49 C.F.R. 1131.4(b)(3).

[18] Appellees claimed in the district court that the statement did not comply with other subparagraphs as well. The court did not reach those claims. Since the most obvious and prejudicial defaults related to subparagraphs 8 and 9, we confine our argument in this Court to those provisions, leaving to other appellees discussion of additional subparagraphs.

involved in any argument that DOD's statement met the requirements of the regulations.

AFL takes the position that DOD's "response to the requirements of subparagraphs (8) and (9)" was simply that "it had *not* requested the service from other carriers . . ." (Br. p. 22) (emphasis supplied). Having responded in this fashion, DOD was not required to supply "the dates and results of such efforts" or the "names and addresses of existing carriers who have either failed or refused to provide the service" or "the reasons given" by such carriers. Since no attempts to secure service had been made by DOD, no details respecting such attempts need or could be supplied. Nor was DOD in default for not seeking the service from existing carriers, because

> "neither subparagraphs (8) and (9), nor anything else in the Interstate Commerce Act or the ICC's regulations, require a shipper supporting such an application to *make* efforts to obtain the proposed service from others. The regulations simply call for a disclosure whether such efforts have been made. If they have been made the shipper is asked to describe the results of its efforts." (Br. p. 20.)

The Solicitor General, however, takes an entirely different view of the DOD statement. He says that "DOD *did* state whether it had made efforts to obtain the service from existing carriers, and graphically described the results of its efforts . . ." (Br. p. 16) (emphasis supplied). The Solicitor General devotes his efforts to demonstrating, not that such a "graphic description" was unnecessary because DOD had not sought service from existing carriers, but that the description satisfied all but "the most finicky notion of what constitutes reasonable compliance with the rules" (Br. pp. 16-17).

Of these two conflicting views as to whether DOD said it had, or had not, made efforts to obtain the desired service from carriers other than AFL, only the Solicitor General's is sustainable by reference to DOD's statement and to the Commission's order. We deal with the statement in a moment. As to the order, the passage quoted by the Solicitor General (Br. p. 10) shows that the Commission acted on the view that DOD *had* in fact made efforts to obtain the service it wanted from existing carriers, not, as AFL would have it, on the view that DOD had not made such efforts. The Commission's finding in this respect is quite clear:

> "(3) That . . . [DOD] has attempted but has been unable to obtain the required and necessary type of service and knows of no carrier in a position to meet its needs" (A. 368A).

Whatever the merits of AFL's argument might otherwise be, therefore—and we show later that it is in any event meritless—AFL's effort to avoid the burden of showing that DOD supplied sufficient data respecting its efforts to secure adequate service must fail. The validity of the Commission's order must be tested by what the Commission said, not by counsel's *"post hoc* rationalizations." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962); see also, *e.g.*, *Securities and Exchange Commissio* v. *Chenery Corp.*, 318 U.S. 80 (1943); *Zuber* v. *Allen*, — U. S. —, — (38 U.S. L.Wk. 4040, 4049) (1969).

3. *The deficiencies of DOD's statement and the consequent prejudice to appellees.* The key issue in this case, in our view, is whether the Solicitor General is right or wrong in contending that the DOD statement substantially complied with the regulations. The only way to settle that issue is, of course, to measure the DOD statement by the requirements of the regulations. In this case the outcome of that analysis depends upon the degree of tolerance permitted by the standard of "reasonableness" or, to phrase

it differently, by the standard of the "substantiality" or "materiality" of any deficiencies. For the Solicitor General does not claim that the regulations were in all respects honored. He concedes defaults, but argues that they were not fatal. And for our part we do not contend that every default is fatal, but only those which are substantial.

The content of these norms of "reasonableness," or "substantiality," or "materiality," depends upon the view one takes of the purposes of the regulations. The Solicitor General allows that the DOD statement was deficient in that it did not provide the dates of alleged service defaults and the names of the defaulting carriers, but says "these are the only deficiencies," and that "their absence can offend only the most finicky notion of what constitutes reasonable compliance with the rules" (Br. p. 17). But why is that so? Why should DOD's statement, with these acknowledged deficiencies, be considered to have substantially complied with the rules? That conclusion can be justified only if the defects of the DOD statement did not subvert the purpose of the rules.

Our view of the purpose of the rules is this: The rules on their face indicate that they were designed to elicit information relevant to the statutory standards of an "immediate and urgent need" for service that "no carriers [are] capable of meeting" (*supra*, p. 20). To that end, the Commission by these rules said in effect that generalizations about the inability of existing carriers to provide the service are not enough. Rather, the shippers must describe in detail what happened when they attempted to secure the service. They are required not merely to state the "results" of their efforts—an injunction that might be loosely read—but also to give the names of the allegedly offending carriers, the dates of the shipper's unsuccessful efforts, and the reasons asigned by the carriers for their inability to

perform. Those requirements for details enable the Commission to test general assertions by the number and quality of specific examples. Moreover, since the rules also provide for the filing of protests, these requirements become even more significant, for they permit particularized rebuttals by the allegedly inadequate carriers rather than general disclaimers.

On this view of the purpose of the regulations, the standard by which to judge the materiality of an omission is whether, had the missing details been provided, the case for an "immediate and urgent need" that existing carriers are not "capable of meeting" might have seemed significantly less compelling. And this test of materiality is at the same time the traditional test of prejudice—had there been compliance, might the Commission have denied the application. But if this is the standard against which the DOD statement is to be measured, then, as we will demonstrate, there can be no doubt that the DOD statement not only failed to comply with the literal requirements of the regulations, but fell far short of reasonable compliance.

Before discussing the contents of the DOD statement, we state our points of agreement and disagreement with the Solicitor General as to DOD's compliance with the terms of the regulations. First, the Solicitor General, as noted above, says that DOD answered in the affirmative the question put by subparagraph 8 as to "[w]hether efforts have been made to obtain the service" desired. The Solicitor General, we think, is correct. The DOD statement made quite clear that it had had vast experience with existing carriers in the territories involved, that it had attempted to secure from them transportation that would meet its "need for speed," but that the need "has not been met in many, many instances by the current certified motor carriers" (A. 198a). Thus the statement supports the Com-

mission's finding that DOD "has attempted . . . to obtain the required and necessary type of service" (A. 368a).

Since DOD represented that it had made efforts to obtain the desired service, the balance of the requirements of subparagraphs 8 and 9 came into play. All of them in one form or another oblige the shipper to provide details as to his allegedly unsuccessful efforts. Taken together, they call for the "results of such efforts," the "dates of such efforts," the "names and addresses" of the carriers who "either failed or refused to provide the service," and "the reasons given for any such failure or refusal."

The Solicitor General concedes that DOD did not supply either names, addresses, or dates, but says that it did describe the results of its efforts and the reasons for the defaults (Br. pp. 16-17). The Solicitor General is incorrect with respect to the provision of reasons. The regulation requires a statement of "the reasons given for any such failure or refusal"—that is, the reasons given by the carrier who allegedly failed to perform. Nothing of that sort appears in the DOD statement. When the Solicitor General says that DOD "explained in detail the reasons why existing carriers were unable to provide the service needed," he refers to the reasons that *DOD thought* accounted for the alleged service failures. That is not what the regulations ask for. Nor do we agree that DOD sufficiently described the "results" of its efforts; but whether or not it did is immaterial, since as we now show the other deficiencies in the statement are quite enough to require a decision that there was not substantial compliance.

The DOD statement is long and carefully composed. It repeatedly stresses the importance of the defense mission of the Department, and it provides a certain amount of detail on a variety of topics. But if the statement is read with an eye toward the question of compliance with sub-

paragraphs 8 and 9, skillful draftsmanship cannot obscure the almost total want of specificity respecting DOD's allegedly unsatisfactory experience with existing carriers in circumstances where, had there been such specificity, the force of DOD's general claims might well have been markedly diminished. The five portions of the statement relevant to this element of DOD's showing—its allegedly unsatisfactory efforts to obtain sufficiently speedy service—may be summarized as follows:

a. In seeking to explain why there is an "immediate and urgent need" for granting AFL authority to transport all types of commodities between all points in a 14 state region, DOD begins with the undoubtedly correct statement that it "must effect movement of a vast quantity of a multitude of different commodities between different points," and that "a substantial percentage of its total transportation requirement" is for such movement in the region in question (A. 194a-197a). But DOD does not, nor could it reasonably, claim that all of this freight—which includes such items as salvage, surplus equipment returned from overseas, and canned fruits and vegetables (A. 198a)—must be moved with all possible speed. Rather, DOD says that "[a] part of" this traffic "requires that it be transported . . . in the most expeditious manner possible" (A. 198a). DOD does not say which "part," or between which points. More importantly, even as to that "part," DOD does not say that it is never, or even that it is not often, carried with such expedition. Rather, DOD says simply that "in many, many instances" this "need for speed has not been met by the current certified motor carriers . . ." (A. 198a).

Given the "vast quantity" of commodities shipped in "tremendous volume" between "innumerable points" for DOD (A. 195a, 198a), the assertion that in "many, many" instances the speed of delivery was unsatisfactory hardly

provides a very precise basis for measuring the degree of seriousness of the problem. Accordingly, one must look to the balance of the statement for specification.

The statement, however, follows this assertion respecting the "many, many" instances of default, not with the description of any of those instances that is required by the regulations, but with three alleged reasons for the deficiencies of carriers other than AFL. The first reason is one particularly emphasized by AFL's brief. As AFL describes it, DOD on the basis of its experience with joint as against single-line service *"viewed AFL's service as three times faster than that available from other carriers"* (Br. p. 22, see also Br. p. 37) (emphasis AFL's). That is, to put it very conservatively, an overstatement. What DOD actually said was that a "majority" of available service is joint-line, and that "experience has shown" that as to such service DOD must "*in some cases*" allow 24 hours for each 300 miles, whereas single-line service over direct routes with two-man driving teams "generally" takes only 8 hours for each 300 miles (A. 198a-199a) (emphasis supplied). Apart from the ambiguities in the assertion that a "majority" of available service is joint-line and that "generally" single-line service is faster, the sponginess of a declaration that "in some cases" joint-line carriers can move traffic at a speed of only 300 miles a day is evident.

Next, DOD states that "virtually all" existing carriers move over regular routes, which are "often" circuitous (A. 199a). But DOD does not say how "often" is often, or how "circuitous" is circuitous, or how often and to what extent this factor has delayed the transportation of what kinds of commodities between what points by what carriers.

The next assertion is much the same. DOD says that "some" regular route carriers use single drivers rather than two-man teams, which "sometimes" causes delays

because of the resulting substitution of drivers and power units during the movement. DOD does not say how often, how much delay, how many carriers are involved, who they are, or which points are affected (A. 199a).

As to each of these assertions respecting DOD's unsuccessful efforts to obtain swift service, then, the provision of the details required by the regulations—a description of particular incidents with names, dates, and the carrier's assigned reasons for delay—might well have deflated DOD's claims. "Some" might have turned out to be but a handful; the delays even on those "sometime" occasions might have been, by and large, slight; only one or a few carriers operating between but a few points might have been responsible for any significant delays; or many of the significant delays might have been due to factors such as weather or the failure of DOD to specify desired delivery times.

b. The next portion of the statement is evidently designed to supply detailed evidence to support the preceding general assertions respecting the overall inadequacy of existing service (A. 200a). But *only three* examples are given, and as to those little detail is given—certainly not the detail required by the regulations. Thus, for its first example DOD asserts that "some" shipments of explosives between two given points by joint-line service require 6 to 11 day delivery as against "third morning" delivery by an existing single-line carrier. But DOD again does not indicate how many is "some"; it does not name the carriers or the dates of the alleged failures; nor does it suggest why in any event its needs cannot be met by the existing single-line carrier. Next, as to shipments from St. Louis to points in California, DOD asserts that " 'transit times' that could be afforded by carriers holding 'single line' authority for operation over irregular routes would be little more than half that now experienced through use of 'regular route' carriers." But

the only element of this statement that is specific is the points of origin and destination. One presumes that this estimate is based upon facts—DOD's actual experience with existing carriers. Those facts are not disclosed. That also is the case with respect to DOD's last example, a similar comparison of existing joint-line and single-line transportation of shell cases between two points. And here again DOD does not indicate why, if it prefers single-line service, the existing single-line carriers cannot serve its needs.

But not only are these examples in themselves deficient because of a want of the specificity required by the regulations. Just as important is the consideration that, even had sufficient data been supplied as to these examples, it could not in reason be maintained that specificity as to these few instances would adequately support DOD's sweeping generalizations about the overall service available to it respecting the transportation of all commodities between all points in the multi-state area involved.

c. The DOD statement next identifies several special problems that allegedly are not solved through the use of existing carriers (A. 204a-205a). First, in "many" instances it is necessary to coordinate the arrival of inbound shipments with the production schedules of manufacturing installations. But here again *only two* examples are given in support of the conclusion that this is a problem that arises "many" times; *only one* example is given to show that the use of existing carriers is not adequate to solve the problem; and even with respect to that example the statement does not identify the carriers that allegedly have performed unsatisfactorily. What if it turned out upon compliance with the name-date-occasion requirements of the regulations that this was the only, or one of but a few, situations in which the problem arises? That this is not a far-fetched assumption is indicated by the fact that, as to these two examples,

DOD is speaking of production facilities that do not have adequate warehousing. Presumably, or at least possibly, that is not a condition that exists at many government production facilities.

DOD's next special problem is assertedly the need to secure delivery of freight in advance of ship or aircraft departure where the freight is destined overseas. DOD appears to concede that this problem can normally be taken care of by loading "at interior origin points sufficiently in advance of the scheduled transshipment date to allow for the transit times normally required by the particular carriers involved" (A. 205a). However, DOD says that it "has experienced situations" where despite such advance planning the shipments were late. *One* "concrete example" is provided, and as to that the allegedly defaulting carriers are not named and there is no indication as to how often they defaulted or what reasons they assigned for the delays.

d. The statement cites five examples of AFL's "excellent" service (A. 207a-208a). In each case, AFL was able to make delivery within the required time, whereas "based upon [DOD's] experience" no existing carrier could have met the deadline. But the carriers that allegedly could not have performed are not identified, nor is there any description of any sort respecting the "experience" upon which DOD's judgment was assertedly based.

e. Finally, DOD says that, even though existing service may be adequate for some commodities between some points, "any transportation system which is largely comprised of carriers holding 'bits and pieces' of authority . . . is inherently inefficient" (A. 200a-201a). That "bits and pieces" description, of course, accurately characterizes the entire regulated motor carrier transportation industry under the system established by the Congress as implemented by the Commission. The statement cites no instance in which

the "bits and pieces" system was responsible for service failure, nor does it undertake to support its generalization in any other way.

In short, the DOD statement is composed almost entirely of sweeping assertions, but assertions that are at the same time invariably hedged in telltale fashion—there are "many, many instances" of failure of existing carriers to meet DOD's needs for speedy service; a "majority" of available service is joint-line and "in some cases" single line service is three times faster; regular routes are "often" circuitous; "some" existing carriers use single drivers rather than two-man teams and this "sometimes" causes delays, and so on. To support these assertions, only a handful of examples are mentioned, and even as to those the regulations are not followed—there are no dates, no names, no addresses, no recitation of reasons given by the responsible carriers.

These are precisely the kind of generalizations and vague assertions that would have been penetrated by compliance with the rules; and had the necessary details been provided, a substantially different picture might well have emerged. The "many" and the "some" and the "sometimes" might turn out to be arithmetically correct descriptions of a comparatively few instances. Those might be confined to but a few carriers between but a few points as to but a few commodities. Some or most or all of those might, in addition, be explicable. That might also be the case respecting the few examples that are mentioned in the statement had the allegedly offending carriers been named and their claimed defaults been identified. It is suggestive in this respect that, insofar as DOD's statement contained allegations that were specific enough to be checked, protestants were able to cite a number of significant errors (A. 268a, 342a-343a, 348a, 308a-309a). In short, had DOD complied with the regulations, the Commission might well have con-

cluded that DOD's need was not so "immediate and urgent" after all, or that existing carriers are able to meet it, or at the least that the authority should be limited to something less than all commodities for all branches of the Government transported between all points in a 14 state region.

There was not, therefore, substantial compliance, and the other side of that coin is that the appellees were prejudiced by non-compliance. The case meets the classic definition of prejudicial error: the result might have been different had the error not been committed.

We turn now to what the appellants have to say about this. The Solicitor General takes a confession and avoidance approach. He grants that DOD did not provide many of the details required by the regulations; but he says that "it is not hard to understand why this unique shipper, with its enormous volume of varied traffic moving between multitudinous points, would find it substantially impossible to provide such intricate details" (Br. p. 17). First of all, this is really an argument that there would have been good cause for waiving the requirements of the regulations; but DOD did not suggest to the Commission, and the Commission did not find, that waiver would be appropriate. Accordingly, the argument is not available in this Court in defense of the Commission's order. *E.g., Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168 (1962); *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U.S. 80 (1943); *Zuber* v. *Allen,* — U.S. —, — (38 U.S. L.Wk. 4040, 4049) (1969). Moreover, for our part we do find it "hard to understand" why the argument, had it been advanced to the Commission, would have been persuasive. The Commission has held that "[w]here necessary facts are lacking" the Government is not to be excused any more than another shipper would be. *Riss & Co., Inc., Extension—Explosives,* 64 M.C.C. 299, 328 (1955); *National Freight, Inc., Extension—Commodities In Bulk,* 84 M.C.C. 403, 407 (1961). This "unique shipper" is

presumably as well staffed with transportation officers to handle its "enormous volume" of traffic as are less unique shippers; those transportation officers doubtless have a wealth of detailed data available; presumably much of that data formed the basis for DOD's generalizations about the inadequacy of existing service; and plainly, at the very least, that data was readily at hand with respect to the "examples" described in the statement.

This is not to say that DOD was obliged to provide every last detail of alleged service failures over the years, or anything of the sort. The standard, as we have said, is *reasonable* compliance. Particularization of the alleged failures over a significant recent period, for example, would in our view suffice. But what the Solicitor General urges is that, as a matter of law, this Court take judicial notice of the correctness of an argument never advanced by DOD until now, that argument being that DOD is simply not institutionally capable of providing the data required by the regulations even over a limited period or on a random sample or any other sort of basis. To state the argument is, we suggest, to establish its infirmity.

Next, both the Solicitor General and AFL urge that appellees were not prejudiced by the Commission's failure to enforce its regulations.[14] We put AFL's arguments to the side for the moment, because they relate to prejudice in law, not prejudice in fact (Br. pp. 30-31). That is, for example, AFL maintains that there was no prejudice because the regulations do not confer any rights upon private parties, an argument we discuss later.

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[14] We assume *arguendo* that the possibility of prejudice must be shown. It was so held in *National Capital Airlines, Inc.* v. *C.A.B.*, — F.2d — (D.C. Cir., Sept. 12, 1969). Another court, however, has declined to decide this question. *Pacific Molasses Company* v. *F.T.C.*, 356 F.2d 386, 387 n. 3 (5th Cir. 1966). If, as the courts have repeatedly said, an agency's regulations have the force of law, it is not easy to see why a showing of specific prejudice should be required.

The Solicitor General, on the other hand, does state his disagreement with our position that, had the required data been provided, the outcome might have been different. But all he says on that score is that "there is no reason to believe that names, addresses and dates would have changed the weight of the evidence" (Br. p. 17). He does not say why that is so; and we have indicated in some detail why it is not so. Beyond that conclusory assertion, the Solicitor General's argument respecting prejudice simply misses the point. He says: "Given the fact that the Commission had before it the information it needed to determine whether AFL's application met the statutory requirements, it is difficult to see how the absence of names, addresses and dates prejudiced the protestants. . . . The numerous protestants introduced a great deal of evidence. . . . Their rebuttal failed to convince the Commission" (Br. p. 17). This ignores the whole theory of the prejudicial error doctrine. The fact is—and so far as we can tell the Solicitor General does not deny it—that the protestants were disabled from framing effective rebuttals by the absence of the required details in DOD's statements. Moreover, the Commission was deprived of supporting data it should have had in order to permit a more informed evaluation of DOD's claims. Had the information been supplied, the result might have been changed. Nothing the Solicitor General says detracts from that conclusion.

B. *The Binding Character of the Rules.*

If there was not substantial compliance with the rules, and if the failure to comply prejudiced appellees, the question remains whether the regulations are binding upon the Commission in such circumstances. That is, the question is whether compliance with these rules is necessary under the principle announced by this Court in *Service* v. *Dulles*, 354

U.S. 363 (1957); *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Yellin* v. *United States*, 374 U.S. 109 (1963); and *Bridges* v. *Wixon*, 326 U.S. 135, 153 (1945).

Here again appellants part company. AFL argues that even if the DOD statement did not comply with the rules the Commission's action should not be set aside because the rules were not "intended for the benefit of protesting carriers" (Br. p. 26). They are, so to speak, merely housekeeping rules that the Commission can enforce or not as it chooses.

While the Solicitor General makes some tentative moves in the direction of this argument (Br. pp. 20-21), in the final analysis he draws back from it. This is the way he summarizes his position:

> "In short, the information requirements of the rule are simply an aid to the Commission in the exercise of its discretion under Section 210a(a). They confer no rights on protesting carriers and do not limit the Board's discretion. *So long as there is reasonable compliance with the rule—thus avoiding the risks that applicants may not be treated equally, or that the Commission may not get quick access to the information it needs—the purposes of Section 210a(a) are met*" (Br. p. 22).

Thus the Solicitor General turns back the inquiry to the question with which we began—reasonable compliance. And he does so for the very good reason that a holding that the Commission is free to apply or to disregard the rules runs the "risk that applicants may not be treated equally." That is, as we now demonstrate, the correct response to AFL's argument.

In the *Service* v. *Dulles* line of decisions, this Court has

established and consistently applied the important principle of administrative law that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature." [15] 354 U.S., at 372. There is nothing in this Court's opinions to suggest, as AFL does (Br. p. 27), that the principle is to be restricted to cases "involving personal civil liberties." Indeed, in a mineral leasing case, *Chapman* v. *Sheridan-Wyoming Co.*, 338 U.S. 621, 629 (1950), this Court, in dealing with a contention respecting an alleged violation by the Secretary of Interior of his regulations, observed: "That [the regulation] binds him as well as others while it is in effect is not doubted." *Cf. Atchison, T. & S.F. Ry.* v. *Scarlett*, 300 U.S. 471, 474 (1937). Nor are the policy underpinnings of the principle respecting an agency's obligation to follow its own regulations—*e.g.*, "the basic human claim that the law should provide like treatment under like circumstances," "the social value in encouraging the security of transactions," the elimination of "the cruder forms of influence from interested individuals . . . [and] reduc[tion] [of] pressures from the executive and from Congress," and the reduction of "expense and delay by avoiding the need for treating each case as *res nova*" (Friendly, *Definition of Administrative Standards*, 75 Harv. L. Rev. 863, 878-882 (1962))—any less relevant to cases involving economic regulation than they are to cases involving individual liberties. Accordingly, the lower courts have repeatedly enforced the principle in cases involving economic regulation by the various administra-

[15] See also, *e.g.*, *Hammond* v. *Lenfest*, 398 F.2d 705, 715 (2d Cir. 1968) ("A validly promulgated regulation binds the government as much as the individuals subject to the regulation . . . and this is no less so because the governmental action is essentially discretionary in nature"); cases cited in note 16, *infra*.

tive agencies, including the Interstate Commerce Commission.[16]

Nor is there any other basis upon which the prejudicial non-compliance with the Commission's regulations in the case at bar can escape application of the *Service* principle. The relevant considerations are as follows:

a. First, the regulations are mandatory in terms. They provide that the shipper's supporting statement "must" accompany the application for temporary authority, and that the statement "must contain at least" the information specified by subparagraphs 8 and 9, as well as that specified by the other subparagraphs. Perhaps a qualification permitting waiver for good cause shown may be implied, as the lower court suggested in a prior opinion dealing with these same regulations.[17] However, as we have already noted (*supra*, pp. 32-33), no request for waiver was made of the Commission, nothing in the Commission's order hints that it was based upon any such theory, and so far as appears no sound reason could have been advanced to justify DOD's broadscale failure to comply.

b. Important economic interests of appellees are at stake in the proceeding. AFL speaks of the "relatively short duration" of a grant of temporary authority; but the emphasis should be on "relatively" and not on "short." Under this Court's decision in *Pan-Atlantic Corp.* v. *Atlantic Coast*

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[16] See, *e.g.*, *Upjohn Co.* v. *Pennsylvania R.R.*, 381 F.2d 4 (6th Cir. 1967) (ICC); *Mississippi Valley Barge Line Co.* v. *United States*, 252 F. Supp. 162 (E.D. Mo. 1966), (ICC) *appeal dismissed*, 385 U.S. 32 (1966); *Pacific Molasses Co.* v. *F.T.C.*, 356 F.2d 386 (5th Cir. 1966); *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221, 224-225 (D.C. Cir. 1959); *School District 2 Fractional* v. *United States*, 229 F.2d 681, 686 (6th Cir. 1956); *McKay* v. *Wahlenmaier*, 226 F.2d 35, 40-43 (D.C. Cir. 1955); *Berchem* v. *R.F.C.*, 191 F.2d 922 (Em. Ct. App. 1951).

[17] *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453, 457 (W.D. Wash. 1968).

Line R.R. Co., 353 U.S. 436 (1957), a grant of temporary authority, despite the 180 day limitation in Section 210a(a) of the Interstate Commerce Act, was held to fall within Section 9(b) of the Administrative Procedure Act so that, upon application, the temporary authority is extended until termination of the permanent authority proceeding. In the case at bar, the permanent authority proceeding is far from over, but the first temporary authority order was issued some 17 months ago. In *Pan-Atlantic*, "as in a high proportion of the instances in which the Commission has extended a temporary authority beyond 180 days, [the] 'temporary' service already [had] been in effect for more than two years." 353 U.S., at 445 (Burton, J., dissenting). And of course AFL's gain during this period—revenues at the rate of $8,000,000 a year and climbing (*supra*, p. 5)—is appellees' loss.

c. This economic interest of appellees is one that, under the statutory framework, has legal status. The fundamental scheme of the Motor Carrier Act is one of regulated competition. The Act was passed because "the industry was unstable economically, dominated by ease of entry and a fluid rate picture" and "as a result . . . became overcrowded with small economic units which proved unable to satisfy even the most minimal standards of safety or financial responsibility." Therefore "Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition. . . ." *American Trucking Associations* v. *United States*, 344 U.S. 298, 312-313 (1953). The statutory requirement respecting issuance of certificates "bespeaks congressional concern over diversions of traffic which may harm existing carriers upon whom the bulk of shippers must depend for access to market." *United States* v. *Drum*, 368 U.S. 370, 375 (1962) (footnote omitted).

The temporary authority statute represents a limited departure from this general scheme. It authorizes the Commission to grant temporary motor carrier authority "without hearings or other proceedings" in exceptional circumstances. But in recommending this legislation, the Commission represented to the Congress that it was sensitive to the need to administer its authority with caution lest undue damage be worked upon existing carriers. As the Commission put it, it "recognized that care would be necessary to protect the legitimate interests of other carriers. . . ." [18]

d. The procedures prescribed by the regulations represent an appropriate method of achieving that goal of "protect[ing] the legitimate interests" of existing carriers in the administration of the temporary authority statute. Where there is a genuine emergency that does not admit of any adversarial proceeding, none is required (*supra* p. 19). But where that is not the situation, as here, the regulations give existing certificated carriers an opportunity to rebut the claims made in the application and in the supporting shippers' statements (*supra,* p. 19). And, in particular, subparagraphs 8 and 9 insure, to the extent feasible in the absence of a plenary hearing, the disclosure of whatever evidence there may be respecting the inadequacies of existing service. This permits the Commission to come to a more informed judgment and also makes more meaningful the right of the protestants to file objections, for it enables those objections to be framed with specificity. Thus the regulations, related as they are to the information-gathering role of the Commission in an adjudicatory proceeding, significantly enhance the prospects of a fair and correct decision by the Commission. In that respect,

[18] S. Doc. No. 154, 75th Cong., 3d Sess. 2-3.

the regulations in principle stand upon the same footing as those involved in *Accardi* and *Vitarelli*, and upon an even stronger footing than those involved in *Service*, where the Secretary of State had simply barred himself in certain circumstances from reviewing determinations of his subordinates.[19]

We consider now the objections appellants raise to the application of the *Service* rule. In this connection, we consider certain suggestions of the Solicitor General, even though, as we have pointed out (*supra* p. 35), in the end he does not claim that in the absence of reasonable compliance the Commission is free to award the authority sought.

First, appellants repeatedly stress that "the record as a whole contained evidence that would support a grant of temporary authority" (AFL Br. p. 28; see also, *e.g.*, pp. 24, 27; Gov't Br. pp. 18, 20). We do not agree that this was so (see *infra* pp. 45-46). But for purposes of the *Service* issue, we are entirely willing to concede *arguendo* that it is. For there would be no point to the *Service* rule if it were applicable only where the action of the agency was invalid on other grounds—*e.g.*, for want of support in the record. In *Service*, the Secretary of State would have been free under the statute to take the action in question. But "[while] it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so . . . and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them." 354 U.S., at 388. So, too, in *Accardi*, *Vitarelli* and *Yellin*.

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[19] This was so of the 1949 regulations. The 1951 regulations related in a sense to a fair hearing. But the Court held that the action was invalid under either set of regulations. 354 U.S., at 388-89.

Here again the flaw in appellants' position is that, whatever can be said about the quality of the "record as a whole" as it stood without compliance with the regulations, that record might have been significantly altered had the regulations been followed. This is not a case, then, in which something akin to the "harmless error" rule can be brought into play. It is possible, of course, that the decision of the Commission might have been the same even had the regulations been followed. But it is also possible—in our view probable—that the outcome would have been different. The possibility that appellees "might not prevail" before the Commission even if the regulations are enforced is immaterial, for they are "at least entitled to have the . . . [agency] follow its rules and give . . . [them] consideration according to the standards it has adopted. . . ." *Yellin* v. *United States*, 374 U.S. 109, at 121.

Next, appellants say that, in promulgating these regulations, the Commission did not intend "to restrict its own powers in dealing with emergency situations, or to confer special procedural benefits upon protesting carriers" (Gov't Br. p. 21; see also AFL Br. pp. 25-27). But nowhere did the Commission say that the regulations could not be invoked by protestants. It is true that the Commission did not say explicitly that they *could* be so invoked; but neither did the executive and legislative agencies whose rules were held enforceable in *Service, Accardi, Vitarelli,* and *Yellin.* An agency, in establishing rules that are mandatory in terms, must be held to the natural and probable consequences of its acts. These regulations were promulgated in 1965, after *Accardi, Service, Vitarelli,* and *Yellin.* Those decisions established, if there were any doubt before (see *supra* p. 37 n. 16), that agency regulations have the force of law, are binding upon the administrator, and may be called into service by any party that has a legally

cognizable interest in the proceeding. As we have shown, appellees have such an interest.[20]

Beyond this—and here we come to the most fundamental infirmity in appellees' approach—where an agency establishes rules of the sort involved in this case, it should not matter whether the agency accompanies those rules with a disavowal of any purpose to be bound by them. To honor such an expression of intent would be to undercut the basic policy supporting the *Service* rule, for the result would be that the agency, at its unbridled discretion, could have it both ways. That is, it could invoke the rules and deny some applications solely on grounds of non-compliance, and then in other cases in no way distinguishable it could waive the rules and grant the applications. That, we surmise, is the consideration that finally led the Solicitor General to refrain from taking the position that the regulations are not binding where there is not reasonable compliance, for otherwise, as he puts it, there would be "the risks that applicants may not be treated equally" (Br. p. 22).

Appellants also argue that to enforce the regulations would be "inconsistent with the Congressional policy because it would limit the Commission's ability to act in emergency situations even though the record before it establishes the requirements of Section 210a(a)" (Gov't Br. p. 20). But there would be no more "inconsistency" than in *Service,* which involved restrictions by regulation on a

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[20] Insofar as secondary materials respecting the Commission's intent are relevant, they do not support the notion that the Commission regarded the rules as merely hortatory. "The rules require more complete information to be furnished by carriers and shippers, and set forth minimum standards of proof necessary for a grant of temporary authority." Seventy-Ninth Annual Report of the Interstate Commerce Commission, p. 39. "Requests for temporary authority to conduct regulated motor carrier service will be turned down if the applications do not adequately comply with Interstate Commerce Commission rules. . . ." Interstate Commerce Commission Policy Release of January 23, 1968 (App. B to Gov't Brief).

statute that gave the Secretary full discretion to discharge employees; and so, too, in *Accardi, Vitarelli* and *Yellin*. As in *Service*, the Congress gave the Commission the power to grant temporary authority without prescribing procedures such as those here involved; but as in *Service* the Commission was not "prohibited from" adopting the regulations. 354 U.S., at 388. The regulations, in short, are not invalid under the statute. Moreover, as we have noted (*supra* p. 19), they do take account of true "emergencies" by bypassing many of the requirements that apply to a case like the one at bar; and if even these exceptions prove in practice to be too cumbersome, the Commission is of course free to amend the regulations.

Finally, appellants cite *Estes Express Lines* v. *United States*, 292 F. Supp. 842 (E.D. Va. 1968), *aff'd per curiam*, 394 U.S. 718 (1968), for the proposition that the regulations are not binding. But that case is readily distinguishable. There, when the railroad that was Railway Express Agency's link between Washington, D.C., and Richmond, Virginia, gave notice that it would discontinue its less-than-carload express service, REA applied for temporary authority to continue its shipments by truck. REA submitted supporting statements from eleven shippers, each of whom stated, *inter alia:* "I am currently obtaining the service I need from REA Express, and, accordingly, have had no occasion to seek express service from anyone else." 292 F. Supp., at 844. These supporting statements complied with subparagraphs 8 and 9 of the regulations. The shippers answered the threshold question of subparagraph 8 by saying that they had *not* made any effort to obtain express service from existing carriers, and the other questions were thereby rendered inapplicable. Thus the Commission's order could not have been set aside for want of compliance with the regulations.[21] The case, accordingly, does not re-

[21] The lower court in *Estes* evidently was of the view that, where a shipper says he has made no efforts to obtain the service from other

semble the situation at bar, where the Commission found that DOD had made efforts to obtain the desired service and where DOD's statement was grounded in allegations of unsatisfactory performance from carriers other than AFL.[22]

Of course, in normal course the failure of shippers to seek service from existing certified carriers will be fatal if those carriers assert they are willing and able to provide that service, for in such circumstances the statutory requirements will rarely be met. In *Estes*, the Commission evidently was of the view that, because of the alleged uniqueness of REA's service, such a result should not obtain.[23] Whether the Commission was right or wrong about that, it has nothing to do with the question in the case at bar whether non-compliance of the DOD statement with the regulations prevented favorable action on the application.

C. *The Deficiencies of AFL's Analysis.*

To this point, we have in the main been discussing the issues as they are briefed by the Solicitor General and as

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carriers, the regulations require him to explain why he has not. 292 F. Supp., at 844. A failure to offer such an explanation would doubtless in almost every case doom the application under the statute. Whether it would also violate the regulations is not in issue in the case at bar.

[22] The other decisions cited by appellants are similarly distinguishable. In *Bell Lines* v. *United States*, 1969 CCH Fed. Carr. Cas. ¶82139 (S.D. W. Va. 1969), *appeal docketed*, No. 893, 1969 Term, the court found that the shippers' statements, taken together, reasonably complied with the regulations, thereby distinguishing *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453 (W.D. Wash. 1968), the decision followed by the lower court in the case at bar. ("The case presently before the Court does not fit into the context of the *Acme Cartage Co.* case . . . . In this case some of the many letters responded to every requirement of the rules, as shown by the Commission's 42-page chart above mentioned.")

So, too, the court found substantial compliance in *Superior Trucking Co.* v. *United States*, 1969 CCH Fed. Car. Cas. ¶ 82108 (N.D. Ga. 1969) (The statements "catalog the efforts made, without success, to secure plaintiffs' services."). And in *Roadway Express, Inc.* v. *United States*, 263 F. Supp. 154, 159 (N.D. Ohio 1966), the compliance with regulations issue was raised "for the first time" during oral argument, so that the court held: "This ground of objection . . . was not raised before the Commission and is deemed waived."

[23] In *Estes*, the Solicitor General argued to this Court: "[T]he courts and the Commission have repeatedly recognized the differences between the

they were decided by the lower court. As we have observed, AFL takes an entirely different approach to the case, an approach that is grounded in the view that DOD indicated it had *not* made efforts to obtain the desired service from existing certificated carriers and that accordingly the data required by subparagraphs 8 and 9 did not have to be provided. This approach, we have pointed out (*supra* pp. 22, 24-25), is not open in this case, both because the DOD statement cannot reasonably be read in this fashion and because the Commission's findings establish that it did not act upon the basis of such a view of the statement.

While these considerations are conclusive, it may be useful to note that, even were the DOD statement susceptible of the construction given it by AFL and even had the Commission adopted that construction, the application could not have been saved. It would simply have been deficient on a different ground—the ground, that is, of failure to make the statutory showing of an "immediate and urgent need" that cannot be met by existing carriers, as those statutory standards have been construed in the relevant Commission regulations.

To begin with, even apart from the failure of the DOD statement to comply with the regulations, the AFL application, as measured against the statutory standards, was extraordinarily weak. The Congress conceived Section 210a(a) as a provision that would apply only in cases of "emergency." "Such temporary grants would be limited to situations in which there was an emergency. . . ." S. Rep. No. 1650, 75th Cong., 3d Sess., p. 2; H.R. Rep. No. 2714, 75th

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express service performed by carriers such as REA and the ordinary freight service performed by general commodities motor carriers, such as appellants. *Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328, 332-333 (D. Mass.), *affirmed per curiam*, 376 U.S. 514; *REA Extension—Nashua, N.H.*, 91 M.C.C. 311, 324, 340-341; *Transportation Activities of Arrowhead Freight Lines*, 63 M.C.C. 573, 579-583; *Mistletoe Express Service Extension—Texas*, 61 M.C.C. 735, 744-745; *REA Extension—Durant-Kosciusko*, 34 M.C.C. 111, 114." Motion to Affirm, pp. 4-5.

Cong., 3d Sess., p. 3. That conception was presumably grounded upon the Commission's statements in proposing the legislation. The illustrations employed by the Commission had to do with the "emergencies" created by "[t]he bringing in of oil wells in a new field and conditions created by a flood or other calamitous visitation. . . ." S. Doc. No. 154, 75th Cong., 3d Sess., pp. 2-3.

On the face of DOD's statement, sweeping assertions and all, it is hard to see how the unavailability of AFL's service would resemble such a "calamitous visitation." As AFL grants (Br. p. 36), "No claim was made that the Department was unable to move freight between any points in the territory." In fact, DOD for many years relied entirely upon carriers other than AFL. Doubtless if DOD had restricted its claim to the movement of munitions and other materials destined for our forces in Vietnam, that claim would have been entitled to special consideration. But DOD did not do so. Rather DOD's claim rested upon the "immediacy" and "urgency" of its need for swift transportation of all commodities between all points in a 14-state region. Thus, DOD's claim came down simply to an undifferentiated plea for more efficient overall service. It is hardly surprising, then, that within two weeks of submission of its first statement to the Commission DOD twice represented that it was "not in a position to state that there would be insufficient or inadequate service without American Farm Lines" (*supra* pp. 8-9); that even after filing that statement DOD referred to it as "an expression of the desire of the Department of Defense to have available to it the type and quality of service which American Farm Lines has provided *regardless of the carrier(s) which might provide same*" (A.141a); and that DOD at that point denied that its support of AFL was "in [any] way an expression of dissatisfaction with any carrier members" of American Trucking Associations (A.141a).

Apart from the "immediate and urgent" need standard, the statute also requires that the applicant show that existing certificated carriers cannot meet that need. It is that requirement to which the regulations here in question are especially relevant. They oblige the supporting shipper to disclose whether or not he has made an effort to secure the service he wishes from certificated carriers. If he has not, the applicant will be hard pressed to establish that those carriers are unable to meet the shipper's needs, no matter how immediate and urgent they be. The Commission found that DOD had made such efforts but that they were unsuccessful, and awarded temporary authority despite the fact that, as the Solicitor General concedes, the DOD statement did not in several respects supply information called for by the regulations. Thus the narrow issue before the lower court, and before this Court, is whether, to what extent, and with what consequences the DOD statement did not comply with those regulations.[24]

Had the Commission adopted AFL's present view—that DOD admitted it had made no efforts to secure the service it desired from existing carriers—the litigation before the Commission and the lower court would have had a very different focus, but the impropriety of granting temporary authority would have been just as evident. Indeed, one can fairly surmise that the Commission did not adopt AFL's approach because of its manifest weaknesses.

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[24] AFL raises as a separate issue the question "[w]hether the record as a whole contained evidence to support the Commission's grant of temporary authority . . ." (Br. p. 3). However, as AFL acknowledges, "the district court did not reach" this question (Br. p. 33 n. 23). Nor was it presented in the jurisdictional statements. See Rules 15(1)(c), 40.1(d)(2). Nor has the Solicitor General asked that it be considered. Nor will other appellees discuss it in their briefs, we are advised. Moreover, as we indicate in this portion of our brief, AFL's analysis of the relevant evidence is colored by its unique reading of the DOD statement. In such circumstances, we confine our discussion to the only issue properly raised and fully briefed—the compliance with regulations issue—and treat the statutory standards only insofar as they bear on that issue.

In the first place, the threshold question would of course have been whether the DOD statement could bear such an interpretation. It cannot, as we have indicated (*supra* p. 24). But beyond that, if in truth DOD had said what AFL now asserts it did say, there would have been a total absence of probative evidence indicating that existing carriers could not meet DOD's reasonable requirements. AFL's argument to the contrary apparently would turn upon its notion that the only "real issue" before the Commission was "whether direct single-line service was available to the Government to any meaningful extent" (Br. p. 31). That was so, in AFL's view, because of the "rather obvious proposition that direct single-line service is faster and safer (a particularly important consideration where many tons of explosives are being transported) than circuitous multiple line service" (Br. pp. 30-31). And, AFL's argument runs, the only "real issue" was properly resolved in AFL's favor since the evidence showed that the "majority of all certificated service available to the Department is provided on a joint-line basis" and because "virtually all certificated carriers are required to follow regular routes" (Br. pp. 36, 37, 31).

Apart from the fact that such an analysis would not justify the grant of authority respecting the many points between which certificated carriers did have single line authority (*supra* pp. 12-13), the difficulty is that the "rather obvious" superiority of "direct single-line service" is not obvious at all, either to us or to the Commission, judging by its regulations. It is, of course, theoretically possible for the single-line irregular route carrier to move commodities faster than the joint-line regular route carriers. But by and large that possibility, even as a theoretical matter, is not to be measured in large blocks of time. The interchange of truckload traffic between carriers engaged in joint through-route service does not normally involve the trans-

fer of lading from one trailer to another; and sometimes it does not even involve the change of tractors or drivers. (See, *e.g.*, A.25a, 224a). Moreover, between major shipping points there are generally only a few highways that are feasible alternative routes, and generally regular route carriers are authorized to move over those highways (see, *e.g.*, A.335a). Just as importantly, whatever theoretical advantage the single-line irregular route carrier may have is often more than offset by the practices and resources of joint-line carriers (see, *e.g.*, A.60a). Able management and adequate equipment and personnel are, in our view, much more important factors to the speed and reliability of service than anything else. These considerations may explain why DOD, after providing considerable detail as to the absence of single-line authority between various points, was unwilling to go further than to say that "in some cases" single-line service was markedly faster than joint-line service (A.198a-199a).[25]

Presumably for these reasons, but at any rate for some reason the Commission deemed adequate, the Commission has prescribed that the absence of single-line authority will not be considered a ground upon which to award temporary authority, but that rather the test will be the actual ability of existing certificated carriers to perform the desired service. The governing regulation is as follows:

> "(4) *Single-line service.* Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable

[25] As we have already noted (*supra* p. 27), this is the passage in DOD's statement that AFL repeatedly misstates by eliminating the "in some cases" qualification.

of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved." 49 F.C.R. §1131.4(b)(4).

This regulation reflects a principle the Commission has applied elsewhere in rejecting the argument that "joint line service is inherently inadequate." *Leonard Bros. Transfer, Inc.—Ext.-Californis-Texas,* 103 M.C.C. 263, 267 (1966); *Pine Tree Transport, Inc.—Extension—Frozen and Canned Fruits,* 54 M.C.C. 669 (1952); *Curtis, Inc.* v. *United States,* 225 F. Supp. 894, 900 (D. Colo. 1964), *aff'd,* 378 U.S. 128 (1964), and cases there cited. In view of this regulation and the case law, it is hardly surprising that the Commission in its order, and counsel for the Commission and the United States in their brief, do not share AFL's view that the adequacy of existing service is to be tested simply by a survey of Commission records relating to the authority of certificated carriers.[26]

II

The Lower Court Did Not Abuse Its Discretion in Holding the Commission's Order Invalid on the Ground That the Commission Acted Beyond its Authority in Reopening the Proceeding Without Securing Consent of the Court.

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[26] There are intimations in DOD's statement that it was also interested in AFL's service because AFL was able to provide a complete service respecting all commodities between all of the points in question (A. 201a). Appellants do not stress that consideration in their briefs. They hardly could. The Commission's rules again stand in the way.

"(5) *Complete service.* Requests for temporary authority on the basis of 'providing a complete service to a shipper,' even though existing carriers are participating in the traffic and in many instances can provide a substantial part of the service, require special justification. Generally, in such instances, the applicant must establish with reasonable certainty that the existing carriers cannot adequately serve the shipper in their authorized territories, or that the supporting shipper has revised its distribution methods to such an extent that there actually is an immediate and urgent need for the complete service proposed." 49 C.F.R. § 1131.4(b)(5).

The district court's decision was based upon the alternative ground that the Commission had acted without authority in reopening the proceeding without permission of the court after the lawsuit had been instituted and a restraining order had been issued, and that this action by the Commission in excess of its authority warranted setting aside the order that was the product of the reopening. That determination was correct on both counts—that is (a) the Commission did exceed its authority and (b) it was within the district court's discretion to regard the default as fatal.

A. *The Source and Nature of the Principle Limiting Agency Discretion Where Judicial Review Proceedings Have Commenced.*

The principal thrust of appellants' arguments on this branch of the case seems to be that the holding of the lower court was erroneous because the pendency of petitions for reconsideration at the time the Commission reopened the proceeding kept alive the Commission's jurisdiction. We suggest that a more orderly analysis of the issue opens with the question whether, in the absence of the pendency of the petitions for reconsideration, the Commission's action would have been within its authority, and then, if the answer is that it would not have been, proceeds to the question whether the pendency of the petitions should change the outcome. Accordingly, we begin with a discussion of the basic principle involved.

That principle, as Professor Jaffe puts it, is that

> "While a case is in court the court's jurisdiction is said to be exclusive. The agency cannot act upon its order while the 'case' is 'in the court.' But when the court remands 'the case' to the agency, the agency once more

has jurisdiction." (*Judicial Control of Administrative Action* (1965) 709.)[27]

The Solicitor General evidently views the doctrine more narrowly, but he nonetheless concedes that one principal "inherent in the nature of judicial review" is that the "Commission cannot act in a manner inconsistent with the jurisdiction of the court" (Br. p. 26). So this Court stated in *Inland Steel Co.* v. *United States,* 306 U.S. 153, 160 (1939):

> ". . .[S]ince the court had exercised jurisdiction and suspended the [Interstate Commerce] Commission's report and order, the administrative body was without power to act inconsistently with the court's jurisdiction. . . ."

As this Court stated in 1883, the "general rule," subject to some qualifications not here pertinent, "is that an appeal suspends the power of the court below to proceed further in the cause," *Hovey* v. *McDonald,* 109 U.S. 150, 157 (1883). See also *Neely* v. *Eby Construction Co.,* 386 U.S. 317, 324 (1967); 6a Moore, *Federal Procedure* 3857.

The most obvious application of this doctrine is that if the inferior tribunal desires to reopen the record or to enter new orders pending review it must obtain permission of the reviewing court. See *Ford Motor Co.* v. *NLRB,* 305 U.S. 364 (1938); *Anchor Line, Ltd.,* v. *Federal Maritime Com-*

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[27] See also *Arrow Transportation Co.* v. *United States,* 176 F. Supp. 411, 415 (N.D. Ala. 1959), *aff'd,* 361 U.S. 353 ("Once jurisdiction is vested, it cannot be ousted" by subsequent orders of ICC.); *United States* v. *Herbold Laboratory, Inc.,* 267 F. Supp 53, 54 (D. Cal. 1967) ("Once [judicial] review is undertaken, neither the Commission nor any other entity has any jurisdiction to interfere in the matter."); *cf. Pan American Petroleum Corp.* v. *Federal Power Commission,* 322 F.2d 999, 1004 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 941 (1963); *Public Service Comm'n* v. *Federal Power Commission,* 284 F.2d 200, 206 (D.C. Cir. 1960).

mission, 299 F.2d 124, 125 (D.C. Cir. 1962), *cert. denied,* 370 U.S. 922; *McClatchy Broadcasting Co.* v. *Federal Communications Commission,* 239 F.2d 19 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 918. State law governing administrative agencies typically is parallel to the federal rule. 2 Cooper, *State Administrative Law,* 622 (1965). See also Section 15 (e) of the Revised Model State Administrative Procedure Act. And the rule also applies to federal courts and commissioners while their decisions are pending review. The principle is of ancient standing. Thus, in 1907 this Court, in *Liu Hop Fong* v. *United States,* 209 U.S. 453, 462, reversed the lower court for relying on a commissioner's supplemental finding because the additional finding "was made without order of the court" and "[w]e are not aware of any statute that gives the commissioner a right to make up and file such additional finding; he had made and filed a certified transcript in the case, and there ended his authority in the matter." Probably the most common application of the rule today occurs when a party moves for a new trial in the district court while the case is pending appeal. "[T]he practice is to permit such motions to be filed in the district court without leave, and if the district court considers the motion favorably it can then ask the case be remanded." *Krock* v. *Electric Motor & Repair Co.,* 339 F2d 73, 74 n.1 (1st Cir. 1964).

Apart from his reliance upon the effect of the petitions for reconsideration filed by some of the appellees, the Solicitor General's position that the Commission was free to act as it did is based, not on any precedent, for so far as we know there is none in his favor, but rather on the arguments that the "Commission informed the court of its action" and that the "court had an opportunity to stay operation of the second order pending review and, in fact, did so" (Br. p. 27). The first reason—that the Commission "informed

the court"—which seems to turn upon some notion of estoppel against the court, can be passed quickly. Whatever its merits might be in other circumstances, the argument has no place in this case. Not only was the Commission's motion for a stay filed *after* the Commission had already ordered reopening of the proceeding, but it was not noticed for hearing (*supra* p. 12). The Commission in the lower court expressed its "regret" at its "failure to call this matter for argument as required under local rules" (Br. pp. 10-11).

So the argument comes down to the fact that the Commission did not try to evade the initial restraining order and that the court had a chance to stay the second Commission order. But the reviewing court *always* can stay the action of the agency or the trial court, and the lower body almost *never* acts in contempt of a stay, so that in the Solicitor General's analysis the rule restricting the authority of the lower body is narrowed to the point of invisibility. This analysis will not serve. In the case at bar the Commission reopened its proceedings and then in its answer to plaintiff's complaint informed the court that it had mooted the original order for several reasons—including the desire to "receive evidence which this Court found was required to support a grant of temporary authority. . . ." (A.385a.) The court rejected the Commission's position because,

> "[j]urisdiction . . . vested in and had been exercised by this court in an extended evidentiary hearing wherein the ICC actively participated. . . . In these circumstances, without prior leave of court, [the] ICC was without authority to take any action which directly or indirectly might nullify or impair the jurisdiction of this court over the ICC order under review." (A.395a.)

Clearly that holding was not error. *Inland Steel,* to say

nothing of the other authorities cited above, declares as much.

Beyond these arguments, the Solicitor General seeks to distinguish some of the decisions upon which we rely on the basis that they dealt with review statutes different from those governing the Interstate Commerce Commission. He argues that when Congress "has intended" to preclude further agency action pending review, it has "expressly provided that the jurisdiction of the reviewing court shall be exclusive. . . ." "Absent any statutory prohibition . . . [against reopening the record, the Commission] was free to do so." (Br. pp. 25, 27). The fact is, however, that when Congress intends to deny the courts exclusive jurisdiction pending judicial review, Congress does so in very clear terms. Thus, in 1958 Congress revised the judicial review provisions for many of the major administrative agencies by granting the agencies *concurrent* jurisdiction with the reviewing courts for the time between filing a petition for review and filing the record. P.L. 87-791, 72 Stat. 941-951. See Senate Report No. 2129, 85th Cong., 2d Sess. (1958). While that Act applies to a wide variety of agencies, it was "not intended to apply . . . to the review of such agency orders as are by law reviewable by the district courts. . . ." (*Id.* at 2-3.) Accordingly, the Act does not empower the Interstate Commerce Commission to act concurrently with the reviewing court. And inasmuch as neither the Interstate Commerce Act nor the Urgent Deficiencies Act contains a similar grant of power to the Commission, the reviewing court's jurisdiction, by long-standing authority, is exclusive. *Hovey* v. *McDonald, supra,* 109 U.S. 150, 157 (1883).

B. *Enforcement of the Rule and the Relevance of the Prejudicial Error Doctrine.*

The Solicitor General's secondary position is that reopening the record did not prejudice the appellees. First of

all, he does not indicate why the prejudicial error rule should apply in a case like this. We think it should not, because a fixed rule is needed for the sake of orderly procedure. Either the Interstate Commerce Commission must obtain court permission before it reopens a case pending review or it need not do that. To inject the issue of prejudice into the matter is to invite breaches of the rule as well as litigation over its application.

But in any event there was prejudice here, for one of the important interests served by the rule was subverted. The rule serves not only the policy of orderly procedure and avoidance of unseemly conflict between court and agency, but also the policy of impartial adjudication by the agency. Administrative agencies act first as adjudicatory tribunals, and then, after they have issued their decision, as litigants defending the correctness of their action. The danger that derives from this dual role is that, if the agency reopens the proceeding after judicial review commences, it may act not as an impartial adjudicatory agency but as a litigant attempting to win a lawsuit. The risk is that once suit has been brought, and especially where the court has in preliminary fashion indicated reservations about one or another aspect of the agency's action, the agency may reopen the record simply in order to paper over defects that might not otherwise pass muster in the court.[28] The danger is not merely speculative. The Commission, for example, has been sharply criticized for superseding questionable boilerplate orders with *nunc pro tunc* "corrective orders." In *Dixie Carriers* v. *United States*, 143 F. Supp. 844, 852, (D. Tex.,

[28] In *Zuber* v. *Allen*, — U.S. —, — (38 U.S. L.Wk. 4040, 4049) (1969), this Court touched upon a related aspect of the reopening problem. There the Court refused to remand to the administrative department in the absence of a request by the Government, and refused to order a new trial, noting that "[w]hen action is taken on a record the department cannot then present testimony in court to remedy the gaps in the record any more than arguments of counsel on review can substitute for an agency's failure to make findings or give reasons."

1956) *vacated as moot*, 355 U.S. 179 (1957), a three-judge court stated:

> "The vice of the 'and good cause appearing' technique is that it affords nothing the parties or court can take hold of to scrutinize and measure as the basis for the action. That is compounded if, on a challenge, review is then thwarted by substituting something else."

Another three-judge court took up the matter with the Commission in *Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, 231 F. Supp. 422, 428 (N.D. Ill. 1964), where the Commission reconsidered its order while the case was pending review. While the court did not set aside the Commission's order because plaintiffs had entered into stipulations that estopped them from complaining, the court did discuss at length the dangers inhering in such reconsideration—that "an *ex parte* reconsideration of a judicial determination is made" "to perfect" a defense by the agency in court.

It is against these considerations that the Solicitor General's argument that there "was no prejudice" (Br. p. 27) must be measured. The notion seems to be that, as long as the final order of the Commission is legally unassailable except on the ground that the Commission reopened the proceeding without authority, a district court abuses its discretion in setting aside the order. Given the limited scope of judicial review of Commission actions, however, the fact that the Commission on reopening may have insulated its order from judicial rejection does not mean that the Commission's action is "correct" in the sense of representing an impartial disposition of the issues. Accordingly, the real test of prejudice should be whether, had the Commission applied to the court, the court might have taken action to

protect the right of the private litigants to such an impartial disposition by the Commission.

In this case, plainly such action might have been taken. The court, in the first place, might have concluded that the Commission was overly influenced by a desire to shore up its position in court, and accordingly might have denied a request to reopen. Beyond that, the court might have conditioned a grant of the request upon a variety of procedural safeguards. For example, it might have required that appellees be given an opportunity to cross-examine the DOD witnesses. Or it might have provided guidelines as to the specific details that DOD would be required to provide in the reopened proceeding, thus giving appellees a meaningful opportunity to reply. Or it might have obliged the Commission to speak in its final order to the compliance with regulations issue. To be sure, the court could not guarantee by these or any other conditions that the Commission, despite the attack upon its prior order, would act in a wholly impartial fashion upon the reopening. But neither can it be said that such steps would surely fail of the goal, particularly in view of the restraints that would flow from the consequent sharpening of the issues on judicial review. In short, since the Commission's action deprived appellees of the opportunity to secure such safeguards, that action undercut precisely those interests the doctrine of judicial control is designed to protect. Appellees *were* prejudiced.

The Solicitor General's second observation that seems to go to the question whether the court abused its discretion is that "[o]bviously, no party has a right to have an agency's errors preserved pending review" (Br. p. 27). The short answer is that the rule applied by the lower court does not confer that right upon anyone. It merely assures that the court can satisfy itself that the action of the agency will

not disrupt orderly procedure and that the agency will act, not as a litigant attempting to shore up its position by rewriting a record instead of writing a brief, but rather as a disinterested adjudicatory body.

C. *The Significance of the Petitions for Reconsideration.*

Appellants' chief contention is that, because some of the appellees had filed petitions for reconsideration that were pending at the time the Commission reopened the proceeding, the Commission did not exceed its authority. As to this argument, AFL's brief is heavily embroidered with observations that, in our view, have little if anything to do with the legal issues involved but that rather appear designed to show that it is unfair of appellees to complain about what the Commission did. Perhaps the notion is one of estoppel or something of the sort. But whatever it is, AFL is wrong for reasons we summarize in the margin.[29] In the balance

[29] As to what AFL regards as the "awkward situation in which appellees find themselves" in "arguing that their own petitions for reconsideration were unauthorized by ICC rules" (Br. p. 43), (a) many appellees did not file such petitions and (b) those that did were justified in taking such a precaution for if no petitions had been filed AFL doubtless would have advanced in the lower court the position it takes here, namely, that such petitions "were *required* to be filed" as a condition precedent to judicial review (Br. p. 45).

Next, AFL in a variety of ways argues that appellees' actions demonstrated that they were "fully prepared to continue with the pending proceeding before the ICC" and that they had not "at that time . . . perceived any inconsistency or conflict between" the court's jurisdiction and the Commission's action (Br. p. 40). But the only inference that can be drawn from filing the petitions is that those appellees were "fully prepared to have the Commission set aside its order. Moreover, a number of appellees in petitions to the Commission sought the vacation of the reopening order on the ground that "the Court having taken jurisdiction of this matter, the Commission was without power to reopen the proceeding" (A. 177a-194a). (See *supra* p. 12.) And the lower court noted that, in responding to the Commission's motion to stay, appellees asserted their view that the "ICC was not authorized to reopen its proceeding because this court had taken jurisdiction of the matter" (A. 391a).

of this text, we discuss the legal question as presented by the Solicitor General.

The threshold difficulty with the Solicitor General's contention is that, as the lower court held (A. 390a), the petitions "were not authorized by the applicable rule." The Commission's temporary authority rules provide in pertinent part:

> "*Petitions for reconsideration.* Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person." (49 C.F.R. § 1131.6(a).)

Division 1's order of September 3 did not "initially" grant or deny the temporary authority but rather reversed a prior order of the Temporary Authorities Board denying the authority. Thus, under the regulations, no further petition for reconsideration was authorized.[30]

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[30] Appellants rely upon Rule 101(g) of the Commission's General Rules, 49 C.F.R. § 1100.101(g). But under any normal canons of construction, the temporary authority rules, which are later in time and deal specifically with temporary authority proceedings, are controlling. "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute, which otherwise might be controlling. . . .'" *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957). Moreover, it is sensible to apply the special rules rather than the General Rules, for the restrictions of the former upon the filing of petitions for reconsideration are consonant with the general purpose of expediting temporary authority proceedings. The reference to the General Rules merely picks up incidental matters such as the number of copies to be filed. Finally, it is questionable whether the Commission could have established a rule authorizing reconsideration of orders of Division 1 sitting as an appellate division even if it had sought to do so. See *Transamerican Freight Lines* v. *United States*, 258 F. Supp. 910 (D. Del. 1966), a decision the Commission evidently concedes is in point but with which it disagrees (J.S. p. 16 n. 15).

But, even assuming the petitions for reconsideration were authorized by the Commission's rules, the result should be the same. The Solicitor General concedes that, since the Commission had denied appellees' motions to stay its order, the district court properly assumed jurisdiction of appellees' suits and was authorized to issue its restraining order (Br. pp. 23, 24). But once the agency has issued an order that adversely affects private parties so that court jurisdiction is properly invoked, the principle limiting the authority of the Commission to take further action without permission of the court must come into play if the interests of the private parties are to be protected. For the danger that the agency, under the guise of reconsideration, will act as a litigant rather than a neutral arbiter is just as great in the circumstances of the case at bar as it would have been if no petitions for reconsideration had been filed. The facts of this very case are suggestive in this respect. The court had issued a restraining order, in part at least on the ground of a showing respecting non-compliance with the Commission regulations (*supra* p. 11). The Solicitor General agrees that the Commission's purpose in reopening was to attempt to deal with that problem (Br. p. 27 and n. 20), and the Commission's answer states as much (A.385a). Had the Commission at that point demanded compliance with the regulations or at a minimum a showing as to why compliance was impossible, the argument that the Commission was only trying to "remedy a deficiency" (Gov't Br. p. 27) might ring more true. But that is not what the Commission did. Rather, it simply accepted additional evidence from DOD, entered a new order based upon that evidence and then returned to court urging—as appellants do here—that in view of this new evidence its case was salvaged.

Moreover, if there is to be any qualification of the general

rule based upon the pendency of petitions for reconsideration—and we think there should not be—that qualification should go no further than confirming the right of the Commission to grant or deny the petitions. By a denial, the Commission would simply be reaffirming its original order, and by a grant the Commission would, in whole or in part, be awarding the petitioners the relief they were seeking from the court. But that is not what happened here. Here the Commission did not act on the petitions for reconsideration. Nor did it even act on AFL's request that the hearing be reopened, a request that was not authorized under the rules. See 49 C.F.R. § 1100.101(b). Rather, the Commission reopened the proceedings "on the Commission's own motion" (A. 170b). Accordingly, to seize upon the pendency of petitions for reconsideration as warrant for the action taken, as appellants do, is to rest upon the most technical of considerations. Indeed, the Solicitor General seems so to recognize, for, after speaking of the petitions for reconsideration, he makes it clear that they are not esssential to his position: "Indeed, this authority [to reopen] does not even depend on the pendency of petitions for rehearing; Section 17 of the Act, 49 U.S.C. 17(6) and (7), 'empowers the [C]ommission at any time to grant rehearings as to any decision, order, or requirement and to reverse, change or modify the same' " (Br. p. 24). Thus, in the end his argument amounts to a plea for sweeping authority on the part of the Commission to reopen proceedings during any stage of judicial review. Neither that argument nor any of its variations should be accepted by this Court.

Conclusion

For the reasons advanced above, the judgment of the district court should be affirmed.

Respectfully submitted,

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